IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

S.C. SUIT NO. 1688 OF 1997

MR. WENCY BONA REMEDIOS)
RESIDING AT FLAT NO. 18, GALAXY)
APARTMENT, 4TH FLOOR, TARUN)
BHARAT, CHAKALA, ANDHERI (E),)
MUMBAI 400 099.) ..PLAINTIFF

V/S

MR. MUMTAZ HUSSAIN SAYED)
FLAT NO. 283, 28TH FLOOR,)
JUPITER APARTMENT, NEXT TO HOTEL)
TAJ PRESIDENT, 41, CUFFE PARADE,)
MUMBAI.) ..DEFENDANT

BHAVESH PARMAR WITH MS. MANISHA VIRKHARE FOR PLAINTIFF.

N. DINKAR RAO FOR DEFENDANT.

CORAM : S.K. SHAH, J.

JUDGMENT RESERVED ON 4-12-2006

JUDGMENT PRONOUNCED ON 11-12-2006

JUDGMENT

1. The Plaintiff has filed this suit for declaration that the receipt-cum-agreement dated

25-5-1994 is valid and subsisting and that the defendant is bound and liable to perform the same and for specific performance of the said agreement.

2. Mrs. Rabia Rahim (since deceased) had given the suit premises to the plaintiff on leave and licence basis for a period of 11 months from 10-10-1992 on monthly compensation of Rs. 3000/- with a security deposit of Rs. 10,000/-. The leave and licence agreement was executed on 10-10-1992. The period of licence was to expire on 9-9-1993. During the pendency of this agreement Mrs. Rabia Rahim expired and the suit flat was transferred in the name of her husband, the defendant Abdul Rahim Usman. After the expiry of the period of first agreement on 9-9-1993 the plaintiff continued in possession of the suit flat till 10-11-1993 without any further agreement. However, on 10-11-1993 the defendant renewed the leave and licence agreement for further period of 11 months with effect from 10-11-1993 to 9-10-1994 on the monthly compensation of Rs. 3000/- but increased the security

deposit to Rs. 35,000/-. Separate leave

and licence agreement dated 10-11-1993 was executed.

3. The plaintiff alleges that during the continuance of the agreement dated 10-11-1993 the defendant approached the plaintiff in April 1994 and offered to sell the suit flat to the plaintiff for a total consideration of Rs. 6 lacs. The plaintiff thereupon agreed to purchase the suit flat for a consideration of Rs. 6 lacs provided, however, that he was allowed to pay Rs. 3 lacs on execution of the writing and remaining balance consideration of Rs. 3 lacs to be paid on or before November, 1994. The plaintiff alleges that the defendant agreed for this condition. Accordingly the plaintiff made payment of Rs. 3 lacs being the part payment towards the total consideration of Rs. 6 lacs, as Rs. 65,000/- by cheque dated 22-4-1994, Rs. 1,30,000/- by cheque dated 7-5-1994, Rs. 20,000/- by cheque dated 9-5-1994, all these cheques drawn on Syndicate Bank and Rs. 50,000/- by cheque dated 22-4-1994 drawn on Central Bank. Rs. 35,000/- were paid in

cash which was the amount of security deposit under the leave and licence agreement and the same

was adjusted towards part payment, totalling to Rs. 3 lacs. Accordingly the defendant acknowledged the receipt of total amount of Rs. 3 lacs as aforestated and executed the receipt in writing dated 25th May, 1994, allowing the plaintiff to pay the balance consideration of Rs. 3 lacs on or before November, 1994 and agreed to complete the sale by executing the document for sale and transfer of the suit flat in the name of the plaintiff.

4. The plaintiff alleges that by notice dated 27-10-1994 he offered the balance consideration of Rs. 3 lacs before the end of November, 1994 and also intimated the defendant that he was ready and willing to perform his part of the contract and requested the defendant to execute necessary documents and the sale deed in favour of the plaintiff. He alleges that the defendant acknowledged the receipt of the notice but failed and neglected to perform his part of the contract. The defendant neither collected the balance amount

nor completed the sale document. On the contrary the defendant filed a suit for eviction being Suit No. 48 of 1994 before the Competent Authority,

Konkan Division at Bandra, Mumbai, under section 13A(2) of the Bombay Rent Act. The plaintiff further alleges that after filing the suit the defendant gave reply to the plaintiff's notice dated 27-10-1994 and contended that the amount of Rs. 3 lacs which he accepted was by way of loan and not by way of part consideration towards the sale price of the suit flat. The plaintiff further alleges that the leave and licence agreement dated 10-11-1993 came to an end on execution of the agreement dated 25-5-1994 to sell the suit flat to the plaintiff and the plaintiff continued to remain in possession of the suit flat under the said agreement. As such the plaintiff continued to pay the society's dues and outgoings, maintenance, as also the loan amount of the society in respect of the suit flat. The plaintiff also alleges that he has no alternative accommodation whereas the defendant has alternative accommodation and it is, therefore, that the defendant agreed to sell the suit flat to

the plaintiff. The plaintiff alleges that he was always ready and willing to perform his part of the agreement by paying the balance consideration of Rs. 3 lacs. He contends that the defendant by

filing the suit for eviction has committed breach of the said agreement and, therefore, he filed the suit.

5. The defendant resisted the suit by his written statement dated 24-11-2000. The defendant admits to have given the suit flat to the plaintiff on leave and licence agreement dated 10-11-1993. He also admits to have received the amount of Rs. 3 lacs as alleged by the plaintiff. He also admits to have executed writing dated 25-5-94. However, he denies to have approached the plaintiff in April 1994 and offered to sell the suit flat to the plaintiff for total consideration of Rs. 6 lacs and the plaitiff agreed to purchase the suit flat for that consideration. He contends that he received the amount of Rs. 2,65,000/- by way of loan from the plaintiff and he was ready and willing to repay that loan to the plaintiff. He contends that the amount of Rs. 35,000/- was

adjusted by way of security deposit for the leave and licence agreement. He contends that he never executed any agreement for sale of his flat to the plaintiff. He further contends that the plaintiff's own showing plaintiff never paid Rs. 3 lacs being the balance consideration which was

supposed to be paid by 30th November, 1994. He further contends that he never agreed to sell the suit flat to the plaintiff and as such there was no question of completing the said sale document with the plaintiff. As the plaintiff did not vacate the suit flat which was given to him on leave and licence agreement, he contends, he filed Suit No. 48 of 1994 before the Competent Authority under section 13A(2) of the Bombay Rent Act which was decreed and he has already taken possession of the suit flat from the plaintiff in execution of the said decree and order of the competent authority. He further denies that the plaintiff was ready and willing to perform his part of the agreement. On these contentions he claims dismissal of the suit.

6. In view of these pleadings the following issues are framed against which my findings are

recorded as follows :-

ISSUES	FINDINGS
1) Whether the suit is barred by time?	In the negative.

2) Does the plaintiff prove that he has paid to the defendants Rs. 3,00,000/- as alleged by way of part consideration?	In the affirmative.
3) Does plaintiff prove that he was and he is ready and willing perform his part of the contract?	In the negative.
4) Is the plaintiff entitled to the specific performance of the contract dated 25.5.1994?	In the negative.
5)P What order and decree?	As per final order.

REASONS

ISSUE NO. 1.

7. By notice dated 27-10-1994 the plaintiff had called upon the defendant to perform his part of the agreement stating in the notice that he himself was ready and willing to perform his part

of the agreement by offering to pay Rs. 3 lacs being the part balance consideration. To this notice, the defendant replied by his reply dated 8-12-1994 disputing that he ever had entered into agreement for sale of the flat with the plaintiff taking up the stand that the money which he had received from the plaintiff was by way of loan. Thus by this reply dated 8-12-1994 the performance of the agreement was refused by the defendant and therefore, it gave rise to the plaintiff to file the suit. Thus the suit filed on 21st April, 1997 would be within the period of limitation of 3 years from the date of defendant’s refusal to perform his part of the contract or having committed breach of the contract. Therefore, the suit is within the limitation.

ISSUE NO. 2

8. The plaintiff has given evidence stating that somewhere in April, 1994 the defendant approached him and offered to sell the suit flat for a total consideration of Rs. 6 lacs. It is undisputed that the plaintiff paid to the defendant total Rs. 2,65,000/- by 4 different cheques namely, Rs.

65,000/- by cheque dated 22-4-1994, Rs. 50,000/- by another cheque dated 22-4-1994, Rs. 1,30,000/- by cheque dated 7-5-1994 and Rs. 20,000/- by cheque dated 9-5-1994. The plaintiff states that besides the payment of Rs. 2,65,000/-, the amount of Rs. 35,000/- which he had kept with the defendant as security deposit under the leave and licence agreement was to be adjusted towards the part payment towards the consideration of sale price. He states that accordingly the defendant had executed receipt cum agreement dated 25-5-1994. That writing is produced at Ex. P-4. The execution of this writing by the defendant is not in dispute. In this respect it is clearly mentioned that the payment made in April and May 1994 was by way of part payment of the total

consideration of the sale price of the suit flat amounting to Rs. 6 lacs. It is further mentioned in the agreement that the balance amount of Rs. 3 lacs shall have to be paid by the plaintiff to the defendant before November, 1994. The defendant also agreed under the said agreement to comply with all the documentary writing and the execution of the sale deed subject to the approval of the society.

9. As against this, the defendnat's witness who is executor of the will of the original defendant who executed writing Ex. P-4. It is obvious that this witness does not have any personal knowledge as to what transpired between the plaintiff and the defendant. Under the circumstances the writing which is admitted to be executed by the original defendant would make out that the original defendant had agreed to sell the flat for total consideration of Rs. 6 lacs and the payment that were made totally amounting to Rs. 2,65,000/- was towards the part consideration. The writing also makes it clear that the amount of Rs. 35,000/- which the plaintiff had kept with the defendant as security deposit also to be

adjusted towards the part payment making the total part payment of Rs. 3 lacs. As such this issue will have to be answered in the affirmative.

ISSUE NO. 3

10. This is a crucial issue. It is averred by the plaintiff in the plaint that he was ready and willing to perform his part of the contract by making payment of the balance consideration of Rs.

3 lacs as per the receipt cum agreement (Ex. P-4). This balance amount of Rs. 3 lacs was agreed to be paid by the plaintiff to the defendant before November 1994. Pursuant thereto, it is undisputed that the plaintiff by his notice dated 27-10-1994 Ex. P-5 informed the defendant about his readiness and willingness to pay balance consideration of Rs. 3 lacs and called upon the defendant to execute the sale deed and other documents. The plaintiff has also averred in the plaint that he was always ready and willing to perform his part of the contract. However, as a matter of fact what had happened was that the defendant had filed Eviction Proceedings against

the plaintiff by filing a suit being Suit No. 48 of 1994 before the Competent Authority under section 13A(2) of the Bombay Rent Act for getting the possession of the suit flat from the defendant. Eventually it is pointed out at this stage that it is admitted position that the Competent Authority by its Judgement and Order dated 12/11/1998 (Ex. D-1) had passed an order of eviction against the plaintiff. The plaintiff himself has admitted in evidence that pursuant to the said order passed by the Competent Authority

he was evicted from the suit premises. The suit flat is at present lying vacant and unoccupied.

11. The question would be whether the plaintiff has proved that he was always ready and willing to perform his part of the contract. By virtue of the provisions of section 16(c) of the Specific Relief Act, it was necessary for the plaintiff not only to aver but also to prove that he was always ready and willing to perform his part of the contract namely, to pay the balance consideration of Rs. 3 lacs to the defendant. It is true that the plaintiff had called upon the defendant by

notice dated 27-10-1994 to perform his part of the contract for execution of the sale deed informing him that he was ready and willing to pay the balance consideration of Rs. 3 lacs. However, this notice was replied by the defendant by reply dated 8-12-1994. That reply is filed at Ex. D-2. In this reply the defendant clearly admitted to have received the payment from the plaintiff an amount of Rs. 2,65,000/- by 4 cheques. It is further stated in the said reply that the said amount was not by way of consideration towards sale price of suit flat but it was by way

of loan. It is not in dispute that this reply was received by the plaintiff. That must have been received by the plaintiff in December, 1994. Since thereafter the plaintiff did not send any communication to the plaintiff till filing of the suit in April 1997. The plaintiff has neither offered balance consideration to the defendant nor repudiated the defendant’s stand that amount of Rs. 2,65,000/- was by way of loan and not as a part consideration towards the suit flat. Even after filing the suit in April, 1997, the plaintiff never offered the amount of Rs. 3 lacs

to the defendant nor he deposited the said amount in court to prove his readiness and willingness to perform his part of the contract. The defendant has produced certain receipts showing the payment of maintenance and other charges to the society. However, that cannot be taken to be towards the payment of balance consideration. That payment, therefore, cannot be taken to be towards the part performance of the contract in order to show that the plaintiff was willing to perform his part of the agreement. It is well settled that the plaintiff has not only to aver but has also to prove that he was always ready and willing to perform his part

of the agreement, i.e. to pay the balance consideration of Rs. 3 lacs. In this regard, though there is averment in the plaint, in fact there is no proof that the plaintiff has been always ready and willing to perform his part of the agreement. In that regard the plaintiff issued notice dated 27-10-1994 (Ex. P-5) mentioning therein that he was ready and willing to pay the balance consideration of Rs. 3 lacs to the defendant and calling upon the defendant to execute the conveyance in favour of the plaintiff

would not be sufficient. It is well settled that readiness and willingness to perform shall not only till filing of the suit, but till hearing. In this regard, however, the plaintiff has led no evidence. The plaintiff has therefore failed to prove that he was ready and willing to perform his part of the agreement.

12. In fact the defendant had taken out Eviction Proceeding against the plaintiff. Even then the plaintiff kept quiet. It is pertinent to note that he had raised the contention before the Competent Authority also that the defendant had agreed to sell the suit flat to him. But even the Competent

Authority has given the finding that there is no such sale agreement. Apart from this, what is pertinent to be noted is that the plaintiff took no steps to show his readiness and willingness to pay the balance consideration of Rs. 3 lacs. Thus the plaintiff has not only kept quiet for about 3 years till filing of the suit but also kept quiet till the suit is being finally decided. In this regard it is also necessary to mention that in the receipt cum agreement dated 25-5-1994

(Ex. P-4) in the last paragraph, it is mentioned that" I again undertake that in case of failure and non-compliance of the above flat, I shall be liable for damages according to the prevailing market rate". That means that the parties had made provision for damages in the very agreement to which the defendant had agreed to sell the suit flat to the plaintiff. Even for this reason by virtue of provisions of section 16(a) of the Specific Relief Act the plaintiff will not be entitled to specific performance of the agreement. Under these circumstances, this issue shall have to be answered in the negative.

ISSUE NO. 4

13. Since the plaintiff has failed to prove that he was ready and willing to perform his part of the contract he is not entitled to specific performance of the contract dated 25-5-1994. Therefore, this issue shall also have to be answered in the negative.

ISSUE NO. 5

14. Consequently the Suit shall have to be dismissed. Under the circumstances I do not pass any order as to costs. Hence the order :-

ORDER

The Suit is dismissed with no order as to costs.

(S. K. SHAH, J.)